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CHARLES ELMOR

Supreme Court of the United States

October Term, 1932

No. 499

THE MOFFAT TUNNEL LEAGUE and UINTAH BASIN RAILROAD LEAGUE, VOLUNTARY ASSOCIATIONS, *Appellants,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL., *Appellees.*

BRIEF

FOR

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
THE DENVER AND SALT LAKE RAILWAY COMPANY,
THE MOFFAT TUNNEL IMPROVEMENT DISTRICT AND THE MOFFAT TUNNEL COMMISSION.

Appeal from the District Court of the United States for the District of Delaware.

HENRY McALLISTER,
Denver, Colorado,
Solicitor for The Denver and Rio Grande Western Railroad Company, Defendant-Appellee.

ELMER L. BROCK,
Denver, Colorado,
Solicitor for The Denver and Salt Lake Railway Company, Intervener-Appellee.

ERSKINE R. MYER,
Denver, Colorado,
Solicitor for The Moffat Tunnel Improvement District and Moffat Tunnel Commission, Intervener-Appellees.

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Appeal from the District Court of the United States for the District of Delaware.

I.

STATEMENT OF THE CASE.

This brief is filed in behalf of The Denver and Rio Grande Western Railroad Company (herein called the Rio Grande), defendant-appellee, The Denver and Salt Lake Railway Company (herein called the Salt Lake Company*),

* In the Commission's Report (R. 18), its Order (R. 13) and the opinion of the District Court (R. 121), the Salt Lake is referred to as the "Moffat Road." It will be understood that these terms refer to the same company.

The Moffat Tunnel Improvement District and the Moffat Tunnel Commission, intervener-appellees.

The small map attached to this brief shows with approximate accuracy the railroads and other features involved in this controversy, and largely conforms to the map attached to the bill of complaint (R. 12A).

1. Historical and explanatory statement.

A proper understanding of the matters in controversy requires a statement concerning the Rio Grande and Salt Lake Companies and events which preceded the application to the Interstate Commerce Commission (herein called the Commission) resulting in its order challenged herein. The Commission's report dated December 2, 1930, in its Finance Docket 8070, preceding the order herein attacked and on which it was based (170 I. C. C. 4, R. 18), and the opinion of the District Court (R. 121) contain very clear statements of historical and physical facts but a brief presentation thereof will, we believe, serve further to clarify the case.

(a) *The Rio Grande.*

Construction of this railroad began about 1871 and its present system was substantially completed prior to 1890.

Its main line of railroad extends southerly about 120 miles to Pueblo and thence westerly to Salt Lake City and Ogden, a total distance of 782 miles. It rises from an altitude of 4668 feet at Pueblo to 10,240 feet at Tennessee Pass, Colorado, the crest of the Continental Divide, and then descends to 4583 feet at Grand Junction in Western Colorado, and to 4293 feet at Ogden, Utah. Its station of Dotsero is west of the divide and about 343 miles from Denver on the present route, elevation 6167 feet. The Rio

Grande has many branch lines both standard and narrow gauge, in Colorado and Utah, the narrow gauge lines especially having been constructed to serve metalliferous mining camps now exhausted.

Since 1924, the control of the Rio Grande has been in the Missouri Pacific Railroad Company, having a connection at Pueblo, and the Western Pacific Railroad Corporation, whose wholly owned subsidiary, the Western Pacific Railroad Company, owns and operates a line of railroad extending from a connection with the Rio Grande at Salt Lake City, to San Francisco, and other points in northern California (*D. & R. G. W. Application,* 70 I. C. C. 102; *D. & R. G. W. Reorganization,* 82 I. C. C. 745, 752, 90 I. C. C. 141; *Missouri Pacific Application,* 90 I. C. C. 161; *D. & S. L. Ry. Co. Control,* I. C. C. Finance Docket 8070, 170 I. C. C. 4, 5, Exhibit C to Bill of Complaint herein, R. 19).

But while the Rio Grande is controlled directly or indirectly by these companies and constitutes for them a valuable connection, its through or interchange business is not confined to them. At Denver it connects and interchanges with the Burlington, the Rock Island, the Union Pacific, and the Colorado and Southern; at Colorado Springs, with the Rock Island; and at Pueblo, with the Santa Fe and the Colorado and Southern, as well as the Missouri Pacific. At its western termini it connects with the Union Pacific System lines (in addition to the Western Pacific) at Salt Lake City, and with the Southern Pacific and Union Pacific Systems at Ogden.

The Rio Grande is therefore an important link in through traffic between all eastern points (especially through the gateways of Chicago and St. Louis) and the Pacific Coast. But as a glance at the map will show, it is handicapped in competition for traffic to or from the West, originating at, destined to or passing through the Denver

gateway, by its circuitous route through Pueblo, and also, to some extent, by the heavy grades required in surmounting the Continental Divide.

(b) *The Salt Lake Company (the Moffat).*

The railroad of this company extends from Denver westerly to Craig, Colorado, a distance of 232 miles, and was constructed between the years 1903 and 1913 (See, *D. & S. L. Valuation,* 119 I. C. C. 483, 493; See, R. 67). The design of its founder, David H. Moffat, of Denver (the line being commonly called the "Moffat Road"), was to build to Salt Lake City or Ogden, but these plans became impossible, Mr. Moffat died, the railroad went through two reorganizations *(D. & S. L. Valuation,* 119 I. C. C. 483, 493; *D. & S. L. Reorganization,* 117 I. C. C. 397), and as we shall show later, the Salt Lake Company (under its independent management) has no plans for an extension westerly from Craig (R. 98). The Salt Lake as originally constructed, also was compelled to cross the Continental Divide, rising from 5170 feet at Denver to 11,660 feet at Corona (65.47 miles), descending to 6700 feet at Orestod, and 6175 feet at Craig (*Freeman et al. v. A., T. & S. F.,* 73 I. C. C. 178, 183).

(c) *The Moffat Tunnel Improvement District and the Moffat Tunnel.*

The heavy grades upon the Salt Lake in crossing the divide and the severe snows and other adverse weather conditions encountered there rendered operations of the Salt Lake extremely difficult and expensive. (See, *Freeman et al. v. A., T. & S. F.,* 73 I. C. C. 178, 183.) Its abandonment was threatened, and its continued operation was deemed of great economic importance by the people of Denver and the northwestern part of the state which it traverses, especially as it was hoped that through either an extension westerly from Craig to Utah common points,

or (what was more important, because more feasible) the building of the Dotsero Cut-off, presently to be mentioned, the Salt Lake would be strengthened by becoming a part of a through transportation line to the advantage of its tributary territory and the population thereof (See, *Milheim v. Moffat Tunnel Impt. Dist.*, 262 U. S. 710, 718). It was believed that a necessary step to this end was the construction of a tunnel, through James Peak (of the divide) about six miles in length at an altitude of about 9100 feet, and eliminating about 2500 feet of rise. Accordingly, after other efforts had failed, the Colorado General Assembly of 1922 enacted the "Moffat Tunnel Act" (Colo. S. L. 1922, p. 88; R. 63), which, in brief, created the Moffat Tunnel Improvement District, consisting of all of the City of Denver, and parts or all of counties traversed by the Salt Lake. The boundaries of this district are shown with approximate accuracy upon the appended map. This act provided for the construction of the tunnel, as a transportation facility for various purposes, including railroads, power transmission, telephone and telegraph lines and water; the cost thereof to be met by issue of bonds, and, if necessary, special assessments upon the real estate in the district according to benefits to be determined by the Moffat Tunnel Commission provided for by the act and which was vested with the duty of constructing the tunnel; and the leasing of the tunnel, or the several uses thereof, to railroads or others. The validity of this act was upheld by the Colorado Supreme Court and by this court *(Milheim v. Moffat Tunnel Dist.*, 72 Colo. 268, 262 U. S. 710). It was constructed at a cost of about $15,470,000.00 (R. 78). In January, 1926, an agreement of lease of all the *railroad* uses of the tunnel was entered into between the District and its Commission and the Salt Lake Company, for a long period of years (R. 79). The validity of this lease was challenged in litigation begun in January, 1929, but

in all important respects, was upheld by the Circuit Court of Appeals of the Tenth Circuit in November, 1930 (*Moffat Tunnel Improvement District v. D. & S. L. R. Co.*, 45 Fed. (2) 715; certiorari denied, 283 U. S. 837). The Salt Lake Company went into possession under the lease in February, 1928 (R. 79), and the tunnel has since been used as a part of its line. This operation through the tunnel has not only reduced the grade by about 2500 feet, but has shortened the line about 23 miles, (See, *Milheim v. Moffat Tunnel Dist.*, 262 U. S. 710, 718).

In the construction of the main, or railroad tunnel, the District constructed another tunnel (called the water tunnel) immediately adjoining and parallel, the objects thereof being (a) to create a conduit for transportation of water from the western slope of the Continental Divide, to the eastern slope, including Denver, and (b) to expedite construction of the railroad tunnel through various headings from the water tunnel. In fixing the rental to be paid by the Salt Lake Company, the Tunnel Commission apportioned two-thirds of the then estimated cost to the railroad tunnel and one-third to the water tunnel (R. 80).

Pursuant to the Moffat Tunnel Act, the Commission assessed the benefits against all of the real estate in the District (upon which any special assessments are based) at about $45,000,000.00, this amount being approximately 15% of the assessed value of such property; and approximately 89% of these benefits is upon property in the City of Denver, and only 1½% thereof is upon property in Moffat County (R. 78, 80). The comparatively small percentage of benefits outside of Denver is due to the fact that this portion of the District is in mountainous and comparatively sparsely settled country with but few small towns or communities. There are about 80,000 taxpayers in the District, of whom about 70,000 are in Denver (R. 78).

(d) *The "extension" westerly from Craig.*

So much is said regarding this "proposed" extension, that the true facts should be clearly stated, as demonstration that it is a mere dream.

As already indicated, the original hope or purpose of the old Salt Lake Company at the time of the inception of this railroad in 1903, was to build to Salt Lake City. But these plans did not mature.

The present plaintiffs-appellants called as a witness at the Commission's hearing in the proceeding herein involved Mr. Gerald Hughes, Chairman of the Salt Lake Company's board, who had no connection with the Rio Grande. Their purpose was to show that the Rio Grande had, in its negotiations with the Salt Lake, attempted to frustrate an extension of the Salt Lake westerly from Craig. In this they completely failed (R. 98-99). Furthermore, the witness testified that the Salt Lake Company had made no plans for such extension; and that it had not tried to arrange the financing of such extension (R. 98). He stated that at times some directors of the Salt Lake, acting individually and not for it, especially Mr. Alexander Berger (presently to be mentioned in connection with the Salt Lake and Denver—the Bamberger) had taken some interest in it, but he (Berger) had "now sold out" (R. 98). He testified further (R. 99):

> "Q. And it has always been part of the plan of the Denver & Salt Lake enterprise to carry on an extension west to Utah points, if practicable, hasn't it?
>
> "A. Well, I couldn't say that, Mr. Rogers.
>
> "Q. What are the facts in regard to it?
>
> "A. I think the railroad has always hoped for an extension if the business would justify it, and of late years I think a great many in the road

have felt that it could only be justified through some arrangements with the connecting lines on the east and west to favor it with through business.

"Q. Until recently, Mr. Hughes, it is true that the D. & R. G. W. interests have been hostile to an extension west from Craig?

* * * * *

"A. No, the only—speaking of recent years, Mr. Rogers, you might say since the reorganization of the present Salt Lake Road and the reorganization of the Rio Grande, in which my conferences have been largely those referred to by Mr. Vogl in the matter of an arrangement for the construction of the Dotsero Cut-Off, and in that matter I stated it fully when the subject came up. I am not sure but what I volunteered it by stating our position just as I have, and the representatives of the Rio Grande have always stated that they never asked it. I think they stated more, that if they did the Interstate Commerce Commission would not permit it."

The only other "scheme" for the construction of a line through the Uintah Basin to connect with the Salt Lake at Craig, was that of the Salt Lake and Denver Railroad Company, which we shall call the "Bamberger," the name of its principal protagonist. Testimony regarding it was given by Julian M. Bamberger (R. 101), who had intervened in behalf of his company. Unlike the anonymous plaintiffs, Mr. Bamberger did not unqualifiedly oppose the granting of the Rio Grande's application to acquire stock control of the Salt Lake. But he asked that a remarkable condition be attached to the Commission's order, to the effect that if and when the Bamberger or any other line was constructed, it be granted trackage rights over the entire Salt Lake road from Craig to Denver, a distance of 232 miles (R. 77, 108), although he conceded that his

nebulous and supposititious road was not in a position to make a trackage contract (R. 108).

The facts respecting the Bamberger are briefly these: It was a Utah community enterprise and subscriptions were limited to $1,000 each, and somewhere between $35,000 and $50,000 were paid in, prior to or in 1925 (R. 103, 106). In 1925, it applied to the Commission, under paragraph (18) of Section 1 of the Interstate Commerce act, for a certificate of convenience and necessity to build a railroad from Provo, Utah (a point on the Rio Grande about 44 miles south of Salt Lake City) to Craig, *a distance of 297 miles* (R. 102, 106-107). This became I. C. C. Finance Docket 4713. In the summer of 1925, a full hearing, lasting for two or three days, occurred, and in January, 1926, the Commission's examiner filed a report adverse to the granting of the certificate. In July, 1926, the Bamberger filed exceptions to this proposed report, but never pressed them (R. 106). In the hearing, on its application, the Bamberger requested that the Commission should definitely put itself on record against the building of the Dotsero Cut-off, because the local business in the Uintah Basin would not support his railroad, and the construction of the cut-off would divert from the Bamberger a great amount of bridge or through traffic (which it expected to take from the Rio Grande) (R. 107). He testified that at such hearing, Mr. Alexander Berger, who was then a director of the Salt Lake Company but was acting independently of it and then associated with Bamberger, qualified this position regarding the cut-off, but still insisted that its construction would constitute a "serious hindrance" to financing the Bamberger (R. 107). Thereafter Berger sold all of his Salt Lake Company stock (R. 107), and apparently lost all further interest in the Bamberger, thus depriving it of its only possible visible means of support.

A reading of the Bamberger testimony (R. 101-108) will indicate that the witness had no substantial hope that his railroad could or would be built. "We are not certain that we can finance our railroad. We have allowed our application to rest for four years" (R. 108). A notable circumstance connected with the Bamberger application is that it was promoted entirely independent of the Salt Lake (which did not even appear at its hearing) and without any agreement for the establishment of a through route with it (R. 107).

Concluding the discussion of the Bamberger and in order that this court may be advised of the present situation, we deem it proper to say that since the hearing of this case in the District Court, and under date of October 7, 1932, the Commission entered an order dismissing the Bamberger's application. It has not protested that action or asked for a reopening or rehearing of its application.

The record herein shows, by evidence offered not only by witness Bamberger, but by a witness for the present plaintiffs-appellants, that the Rio Grande opposed the Bamberger application at the hearing thereon (R. 109). The latter read into the record an extract from the Rio Grande's brief, which (supplemented by further extracts elicited on his cross examination) read (R. 109-110):

> "We (the Rio Grande) say this because it is evident that the people living in the Uintah Basin, whether in and around the so-called Vernal Country, or in Western Moffat County, Colorado, if the limits of the Basin be extended to include that area, would be benefited by the construction of applicant's railroad. That they need further transportation facilities is undoubted. That the business which they, or their sections, would contribute to this proposed railroad would justify the enormous expenditure involved, is another and far different

question, which we are satisfied must be answered in the negative. That such construction would not only greatly impair the ability of the Denver and Rio Grande Western Railroad adequately to serve the public, but would add another weak, strug gling and impecunious unit to the railroad map of the Rocky Mountain section of the country, is, we believe, manifest from a candid and conservative review of the record in this case.

* * * * *

"The Denver and Rio Grande Western Railroad Company realizes that its interests cannot be allowed to stand in the way of a necessary and economically sound railroad enterprise which will not depend for its possible financial success upon the ruin of established systems of transportation, the prevention of their improvement, and damage to communities and industries which have arisen along their course and which they serve. But the record in this case, both by direct statement of applicant's witnesses and by necessary inference from the facts, shows that applicant proposes to live upon the traffic it takes from the Denver (Rio Grande). Without it the Bamberger line would not exist even on paper, and the application would not have been presented. Even including this traffic a fair review of the evidence and revision of the estimates respecting the cost of the projected railroad and its probable earnings must lead to the conclusion that it will not be self-sustaining, that it must fail financially, and that with such failure it will at least impair the ability of the Denver (Rio Grande) to fulfill its obligations to the public."

Those statements made over seven years ago correctly presented the position of the Rio Grande. Startling

developments during the years since elapsed require one modification, and that is that if anyone could be found willing to pour perhaps $15,000,000 into the construction of these 297 miles of railroad, he would probably be greeted with friendly hands but welcomed to an hospitable grave of his hopes, by those who would continue their transportation (if any) by trucks, buses and the private automobile.

But without resorting to briefs in other cases, the Rio Grande's attitude toward the "extension" was thus stated by its principal witness Williams at the hearing now in question (R. 70):

> "The witness was asked what would be the applicant's attitude toward the construction of a western extension from Craig, to connect with Utah or other western points 'so as to take through traffic over the Denver & Salt Lake into Denver without reference to the D. & R. G. W.' The witness answered, 'It is purely a question of what the traffic will sustain.' It would be unfair toward the stockholders and the public for us to construct mileage which would not sustain itself, because otherwise it becomes a tax on the traffic which you are already moving. Unless you have some reasonable hope of developing rapidly enough to sustain that line I think you would wait until there was more traffic in sight. Asked whether he meant that he would not consider the construction of a route west until there was business to legitimately sustain it, the witness said, 'I cannot say at the moment, I haven't had to face that but I would (fol. 299) not expect a plan to be submitted unless there was some reasonable expectation that the expenditures would earn some reasonable return.' The general tendency of freight rates now is downward, and the general tendency of wages upward;

> new competition such as the motor bus and airplane is facing us and we have to fight for our existence. 'At the present time, in the territory here, we are not earning on the increased investment an amount equal to the carrying charge; if we finance all those improvements with bonds, we have to use some surplus earnings. It is quite evident, under those conditions, that we couldn't look forward to the building of much mileage that would not sustain itself.' "

And again he said, in cross examination by appellant's attorney, that "we will build any time when the traffic will justify it—any time, anywhere" (R. 73).

(e) *The Dotsero Cut-off—I. C. C. Finance Docket 4555.*

But while construction of a 297-mile extension of the Salt Lake from Craig proved impracticable, except in the minds and hopes of certain residents in the territory which it would serve who never intended to hazard a cent in the enterprise, nevertheless there was an obvious and feasible means of strengthening the Salt Lake, assuring its continued existence and benefiting the territory it served, and was a part of the original plan of Mr. Moffat. This was through the construction of the Dotsero Cut-off. It will be observed from the map that while the railroads of the Rio Grande and the Salt Lake are by no means parallel, at one point they approach each other, and it was practicable to construct a railroad only about 41 miles in length, down the Colorado (Grand) River from Orestod, a station on the Salt Lake west of the Moffat Tunnel and about 129 miles from Denver, to Dotsero, on the Rio Grande, west of the Continental Divide. This would reduce the railroad mileage from Denver to Dotsero about one-half or 173 miles, and shorten the distance, via the Rio Grande, from Denver to Ogden, from 782 miles to

609 miles. Furthermore the grade of the cut-off would be slight (the altitude of Orestod being 6700 feet and that of Dotsero, 6167 feet) and this new route would eliminate the heavy Rio Grande grades over Tennessee Pass (10240 feet).

Plaintiffs-appellants have sought in this proceeding to minimize the cut-off as a factor in the minds of the people, in the creation of the Moffat Tunnel Improvement District and in the construction of the Moffat Tunnel. Undoubtedly it was hoped by some that through some financial legerdemain the Salt Lake might be extended or another railroad constructed as a western connection. But the prospect for this was negligible, and from the very beginning the Dotsero Cut-off presented a far better possibility. In 1919, when it appeared that the Salt Lake might be "scrapped," the Colorado legislature passed an act, contemplating the construction of the tunnel, the condemnation of the Salt Lake, the extension to the western boundary of the state and for the construction of a line from "McCoy to a junction with the Denver and Rio Grande Railroad at Dotsero." (Colo. S. L. 1919, pp. 669, 672). Nothing was done under this act and it was repealed at the next session (Colo. S. L. 1921, p. 744). Then came the Moffat Tunnel Act of 1922 above mentioned (*supra*, p. 5), and in upholding its constitutionality this court, in *Milheim v. Moffat Tunnel District*, 262 U. S. 710, while saying nothing regarding a western extension as one of the public purposes to be subserved, did say (p. 720):

> "And the evidence strongly indicates that the tunnel may and will be used, to like advantage, by the Denver & Rio Grande Railroad, extending from Denver to Salt Lake City, with a great shortening and improvement of its line."

This necessarily referred to a Rio Grande user through the Dotsero Cut-off, as it could reach the tunnel in no other way.

These legislative and judicial references indicate that the Dotsero Cut-off has been in the minds of the people throughout all tunnel discussion and action. Of course, a paramount purpose of the tunnel act was to save the Salt Lake, as it furnished the only railroad service to a large section of the state (see 262 U. S. on 718), but next in importance *from a feasible standpoint* was its strengthening through the construction of the Cut-off. That this is true may be confirmed by stating that in the present proceeding before the Commission, the Moffat Tunnel Commission (the official board of the District), the Denver Chamber of Commerce, the Denver Real Estate Exchange, the State of Colorado, and others, intervened and while not opposing the Rio Grande's control of the Salt Lake, *insisted as a condition thereto,* that the Dotsero Cut-off be promptly constructed, and the Colorado Public Utilities Commission made that recommendation (R. 19). It was because of this chorus of demand, that a condition to that effect was incorporated in the order under attack herein.

The prospective construction and Rio Grande user of the cut-off had not only been a public expectation, but it was a factor in the Rio Grande's reorganization of 1924, resulting in equal ownership by the Missouri Pacific and the Western Pacific. In the plan for that reorganization it was stated (R. 136, 64):

> "that the policy to be pursued by the Board of Directors of the New Company (Rio Grande) shall be * * * (2) to encourage the creation of a short line from Denver to Salt Lake City by the utilization of the existing line from Salt Lake City to Dotsero, and a line from the latter point through the proposed Moffat Tunnel to Denver";

and this was referred to by the Commission in its approval of the reorganization (*D. & R. G. W. Reorganization,* 82 I. C. C. 745, 752).

I. C. C. Finance Docket 4555. In 1924, The Denver and Salt Lake Western Railroad Company (herein called the Salt Lake Western), a wholly owned subsidiary of the Salt Lake (whose predecessor was then in receivership), applied to the Commission, under paragraph (18) of Section 1 of the Interstate Commerce Act, for a certificate of public convenience and necessity to build the Dotsero Cut-off. It became known as Finance Docket 4555, and will sometimes be referred to as the Dotsero Cut-off case. Owing to the existing Salt Lake receivership and the fact that Salt Lake operations through the tunnel did not commence until February, 1928, the hearing was delayed. It occurred in September, 1928. As indicated in the Commission's report therein (Ex. I, R. 143, 154 I. C. C. 51), the Rio Grande, the Bamberger, the Moffat Tunnel Improvement District and its Commission, the Public Utilities Commissions of Colorado and Utah, the Denver Chamber of Commerce, the Salt Lake City Chamber of Commerce and various other organizations in Colorado and the Uintah Basin of Utah, intervened. *The present appellants did not appear.*

As evidenced by the Commission's subsequent report (R. 144-148), the Rio Grande's position was this: It recognized that the cut-off could be a useful link in a through transportation route, but it contended that if it were constructed by or under the Salt Lake, and operated by that company, so as to interchange with the Rio Grande at Dotsero, the result would be serious and might be disastrous to the latter, as it would be short-hauled on through business and also on business on its line in western Colorado which it had built up through many years of effort and solicitation. Obviously the greater part of this business through the Denver gateway would pass over the new route rather than over the Rio Grande's more circuitous line through Pueblo. The Rio Grande did not oppose the application providing a condition was attached

to the granting thereof requiring the Salt Lake to grant to it, on reasonable terms, trackage rights over the cut-off and the Salt Lake's own line from Orestod (the eastern terminus of the cut-off) to Denver (Utah Junction). Much testimony was presented on these questions, and the Colorado Public Utilities Commission recommended to the Commission that the application be granted subject to the condition requested by the Rio Grande (R. 144, 154 I. C. C. on 52). On April 15, 1929, the Commission promulgated its report and order found in the record herein as Exhibit I (R. 143; 154 I. C. C. 51), practically in line with the Rio Grande's position. After reviewing the facts it said (R. 148):

> "While the terms of the operating agreement are uncertain, and although the figures shown in the foregoing list are also necessarily approximate in other respects, it is manifest that the interest of the carriers as a whole would best be served under an arrangement whereby the Rio Grande could operate on fair and equitable terms over the cut-off and the Moffat line between Dotsero and Utah Junction. The evidence is conclusive that the cut-off would be of distinct advantage as a transportation facility and that the public interest requires its construction for operation in the manner just stated. If operated by the applicant under active traffic opposition from the Rio Grande, the result would certainly mean financial loss to the Rio Grande and possibly to the Moffat line road as well.
>
> * * * * *
>
> Upon the facts presented we find that the present and future public convenience and necessity require the construction of the line of railroad proposed by the applicant, upon condition that the Rio Grande be permitted to operate over said line and over the Moffat road between Orestod and Utah

Junction, Colo., on fair and reasonable terms to be approved by us,"

An order was entered requiring the Rio Grande, within 30 days thereafter, to file with the Commission and serve on the Salt Lake and the Salt Lake Western, copies of agreements with them setting forth the terms and conditions which the Rio Grande was willing to accept as governing the operations over the Dotsero Cut-off and the Salt Lake's Denver-Orestod line; that unless the Salt Lake and Salt Lake Western executed said agreements (subject to the Commission's approval), they should file with the Commission and serve on the Rio Grande, within thirty days after filing of the Rio Grande's proposal, copies of agreements setting forth the terms and conditions desired by them (R. 149-150). The Commission's authority to impose the conditions was found in paragraph (20) of Section 1 of the Interstate Commerce Act providing that it might attach to its certificates "such terms and conditions as in its judgment the public convenience and necessity may require." (U. S. C. Title 49, Sec. 1 (20).)

The Rio Grande complied with the requirement and filed its proposed agreements in May, 1929, but by that time litigation had arisen between the Salt Lake Company and the Moffat Tunnel Commission over the validity of the tunnel lease, which was not terminated until the opinion of the court of appeals in November, 1930, and denial of certiorari in April, 1931 (*Moffat Tunnel Impt. Dist. v. D. & S. L. Ry. Co.*, 45 Fed. (2) 715, 283 U. S. 837). Therefore, the Salt Lake was not in a position to consider such agreements, and it secured a number of extensions of time from the Commission (See Exhibit C, R. 20, 25; 170 I. C. C. 6, 11).

The matter was in that situation when the Rio Grande made its application to Commission for control of the Salt Lake, which we next discuss, deferring for the moment consideration of subsequent proceedings in this Dotsero Cut-off case.

2. The Rio Grande's control of the Salt Lake—I. C. C. Finance Docket 8070.

(a) *The application and circumstances attending it.*

On December 9, 1929, the Commission promulgated its plan for the consolidation of railway properties, under which both the Rio Grande and the Salt Lake were included in System 18, based on the Missouri Pacific Railroad Company (*Consolidation of Railroads,* 159 I. C. C. 522, 544). In a separate opinion therein, one Commissioner expressed a view that the Rio Grande and Western Pacific might be combined into a system independent of the Missouri Pacific, saying (p. 567) that the "use of the Moffat Tunnel will enable this route to compete on better terms with that of the Union Pacific," thus indicating that the Commission had in mind the construction of the cut-off and its use by the Rio Grande.

At that time there was no assurance that trackage agreements between the Rio Grande and the Salt Lake would be consummated. The latter had not filed its counter-proposals with the Commission in the Dotsero Cut-off case, and even if it had, the terms might have been unacceptable to the Rio Grande, with a resulting deadlock, since the Commission had no authority to compel such agreements except as it might deny the Salt Lake Western's application to construct the cut-off unless they were made.

In view of the Commission's plan of consolidation which rendered a future consolidation of the two properties possible if not probable, and also of the uncertainties regarding the trackage agreements, and the serious effect, as already explained (*supra,* pp. 16-17), upon the Rio Grande of operation of the cut-off by the Salt Lake, in January, 1930, the Rio Grande purchased at $155 per share, 21,334 shares (of the 50,000 outstanding) of Salt Lake Company's stock (R. 65). As that did not constitute

a control, no authority from the Commission for its acquisition was required. But shortly thereafter it entered into an agreement to buy an additional 7,635 shares (subject to the Commission's approval) which, with that already owned, would aggregate about 58% of the total outstanding stock (R. 65). Thereupon, on February 1, 1930, the Rio Grande filed with the Commission its application under Section 5, paragraph (2) of the Interstate Commerce Act (U. S. C. Title 49, Sec. 5(2)) for authority to control the Salt Lake by purchase of stock (R. 135).

(b) *The hearings and position taken by interveners other than appellants.*

Hearings occurred before the Commission's examiner at Denver and Salt Lake City, in March, 1930. In view of the fact that plaintiffs-appellants have abandoned in this court the allegations in the bill of complaint (R. 9), that the subsequent order of the Commission was not supported by the evidence, it is unnecessary to review the testimony which was presented, and which this court will conclusively presume authorized the order. It is important, however, to understand the attitude taken by the interveners in the proceeding, of whom there were many. With the sole exception of the present anonymous appellants, whose status we shall presently discuss, every intervener representing Colorado interests, including the Moffat Tunnel Improvement District and its Commission (R. 77-83), the Denver Chamber of Commerce (R. 83), Denver Union Stock Yards Company (R. 84-86), and Moffat Tunnel Taxpayers Association (R. 87), made no objection to the application providing that conditions were imposed assuring the prompt construction of the cut-off, and (though less uniformly urged) that the Craig gateway be left open. The Rio Grande, while anxious that the cut-off be constructed, was then reluctant to commit itself to a construction within a limited period because of the pending litigation between the Moffat Tunnel District and the

Salt Lake over the validity of the tunnel lease (R. 66, 74-77), and it thought that it should not be bound by stringent provisions concerning possible future connections at Craig in the absence of any knowledge concerning such hypothetical connection. As its witness stated (R. 71):

> "We might find ourselves in a position where we opened our line to a competitor and he did not open his line to us."

But as will be shown, the Commission imposed the two conditions requested by the Colorado interveners and they were satisfied.

As to Utah interests (other than appellant "Uintah Basin Railroad League"), the position of the Bamberger has already been stated (*supra*, p. 8); the Utah Shippers Traffic Association expressed the opinion that any railroad connecting with the Salt Lake at Craig "should have unlimited tr[illegible]age rights over the Moffat Road" (R. 108); and the Utah Public Utilities Commission stated that "it is unopposed to the application here, if provision be made and an understanding had that the granting of it shall not in any manner preclude or be prejudicial to any applicant who desires to furnish transportation facilities to the Basin" (R. 117). This presumably meant that the Craig gateway should be left open, as the Commission's condition requires.

(c) *Appellant interveners, their status and position.*

At the hearing, the present appellants intervened to oppose the application (R. 62). At the outset it is important to consider the status of these unincorporated associations with an anonymous membership:

> "The Moffat Tunnel League is sort of a commercial club of counties, a sort of an association of counties of Grand, Routt and Moffat, all in the tunnel district; commercial clubs, which include ser-

vice clubs, nominate members of the League and the County Commissioners of the three counties each designate from such nominees the members of the Tunnel League. Nine members, three from each county, constitute the League, which has been in existence for about five years" (R. 89).

And the Uintah Basin Railroad League was thus described by its witness (R. 109):

> "I am Secretary of the Uintah Basin League which was organized within the last sixty days; this League is not incorporated, it is a cooperative organization of the service clubs, the towns, the irrigation companies, and the Boards of County Commissioners of Uintah and Duchesne Counties, representing practically all the people of those counties."

We shall further discuss these nebulous organizations in the succeeding argument on the question of their qualifications as plaintiffs in this proceeding.

The Rio Grande contended at the hearing that the real purpose of those appealing interveners was to block the construction of the Dotsero Cut-off (R. 94-95). Its counsel addressing their attorney inquired (R. 95):

> "Q. Are your clients opposed to the building of the Dotsero Cut-off?
>
> Mr. Vogl: No, sir, *but if the building of the Dotsero Cut-off would prevent the extension of the road westward,* yes, sir.
>
> Mr. McAllister: And your position further is that the building of the Dotsero Cut-off would very likely prevent it?
>
> Mr. Vogl: No, sir, if the Moffat Road builds it, they will also build westward where there is tonnage.
>
> * * * * *

Mr. McAllister: If the Denver & Salt Lake builds the Cut-off they will also build the extension?

Mr. Vogl: Yes, sir.

Mr. McAllister: Well, that is a very clear statement, even though it may be somewhat fallacious."

And their witness, taking somewhat the same position, said that "if the Moffat Road owned the Cut-off they couldn't compete with themselves" (R. 97).

We believe that the entire record justifies our statement that this position was a mere subterfuge resorted to because the cut-off was so overwhelmingly demanded by the public generally that opposition thereto would be unpopular among all except these nondescript interveners. Furthermore their logic was grossly faulty. It was that if the Salt Lake owned and operated the cut-off in connection with its own line, it would grow so rich in interchanging through traffic with the Rio Grande at Dotsero at the latter's expense, that it would extend its line from Craig to Utah common points, a distance of 300 miles, and thereby establish a competing line against itself. In brief, it would kill the goose that laid the golden egg and embark upon a perilous adventure.

Appellant's complaint is that the examiner excluded many of their offers of testimony, which is true. But in the interest of brevity the discussion of that question may be deferred to our argument where the character of this evidence will be discussed (*post*, p. 33).

(d) *The Commission's Report.*

Briefs were filed by all parties, oral argument had, and on December 2, 1930, the Commission issued its report discussing all matters very fully (Ex. C to bill of complaint, R. 17; *D. & S. L. Control*, 170 I. C. C. 4). In

conclusion, it said, in substance, that "upon the facts presented we find that the acquisition" by the Rio Grande of control of the Salt Lake by purchase of stock, "will be in the public interest," subject to the following conditions (R. 33-34):

(1) That the Rio Grande should purchase at not exceeding $155 per share any shares of Salt Lake stock which might be offered to it for purchase within six months from the date of the order to be entered;

(2) That the Rio Grande, through the Salt Lake "will establish such through routes in connection with any western connection hereafter constructed under our authority as we may find in a subsequent proceeding or proceedings to be reasonable and in the public interest"; and

(3) That the Rio Grande, through the Salt Lake, should "commence the construction of the Dotsero Cut-off within six months from the date of any order to be entered herein, authorizing the proposed acquisition, and shall complete such construction within two years after beginning it."

And the report concluded (R. 34):

> "No order will be entered at this time. Prior to the entry of any order authorizing the proposed acquisition the applicant shall file with us, for our approval, its unqualified acceptance of the conditions herein prescribed. For the purpose of considering such acceptance, if filed, the proceeding will be held open for 90 days."

3. Subsequent proceedings in the Dotsero Cut-off case (Finance Docket 4555) and the Control case (Finance Docket 8070) and consequent events.

As just stated the Commission's report in its Finance Docket 8070 required the Rio Grande to file within ninety days after December 2, 1930, its unqualified acceptance of the three conditions imposed by the report, which time was subsequently extended (R. 14). As to the Dotsero Cut-off case, Docket 4555, our previous statement ended with the filing by the Rio Grande with the Commission, in May, 1929, of its proposed trackage agreements with the Salt Lake Company (*supra,* p. 18). We now present the succeeding events in the two dockets, which ran concurrently, the Commission treating them as "closely interdependent" (R. 14, 155).

On July 17, 1931, the Rio Grande filed with the Commission its unqualified acceptance of the latter's conditions in Docket 8070 (R. 15, 155), and on the same date the Rio Grande and the Salt Lake joined in filing with the Commission, as contemplated in Docket 4555, forms of agreements governing (1) the construction and operation of the Cut-off by the Rio Grande and (2) granting to it trackage rights over the Salt Lake line between Denver and Orestod (R. 155).

On September 15, 1931, the Commission entered two orders, one in each docket (*D. & S. L. Control,* 175 I. C. C. 542, R. 13; *D. & S. L. W. Construction,* 175 I. C. C. 535, R. 154). The substance of these orders was that in Docket 8070, in view of the Rio Grande's acceptance of the conditions, it was authorized to acquire control of the Salt Lake (R. 15); and in Docket 4555, in view of the trackage agreements which had been made, the Salt Lake Western (to become a wholly-owned subsidiary of the Rio Grande) was authorized to construct the Dotsero Cut-off subject, however, to the express condition that such construction

should be commenced within six months from the date thereof and completed within two years after commencement (R. 161).

The Commission's conditions imposed two very onerous obligations upon the Rio Grande, (1) to purchase at $155 per share all or any part of about 20,530 shares of Salt Lake stock which might be tendered to it for purchase within six months and (2) commencement of construction of the Cut-off within six months and completion thereof within two years after commencement, the estimated cost being $3,800,000. When these orders were promulgated in September, 1931, the unprecedented financial crisis had become even more acute, England was going off the gold standard, and railroad credit was practically destroyed. This condition continuing during the next six months, the Rio Grande applied to the Commission for an extension of time within which to comply with the conditions, and under date of March 15, 1932, the Commission extended the time for purchase of stock and commencement of construction until June 15, 1932 (*D. & S. L. W. R. Co. Construction*, and *D. & S. L. Control*, 180 I. C. C. 715). Later, under date of June 14, 1932, upon the Rio Grande's further application for extension, this date for both purchase and commencement of construction was extended to September 15, 1932 (*D. & S. L. W. Construction* and *D. & S. L. Control*, 184 I. C. C. 721).

Confronted by these orders, the Rio Grande conducted negotiations with the Salt Lake and its minority stockholders (who had the right to tender their stock for purchase) to the following effect: The time when minority stockholders might tender their stock was extended until July 1, 1934, and any stock so tendered during the six months beginning with that date, would be purchased by the Rio Grande at $155 per share with interest from date of tender, on or before July 1, 1935, but meanwhile this right of the stockholders to tender, and (if tendered) the obligation of the Rio Grande to purchase, would be collat-

eralized by a deposit with the Colorado National Bank of Denver, as escrow holder or trustee, of an equal amount of shares owned by the Rio Grande, to-wit, 20,530 shares. As to the construction of the Cut-off, the Rio Grande would apply to Reconstruction Finance Corporation for a loan to commence and complete the construction. This plan was presented to the Commission and, as to purchase of stock, was approved by its report and order of September 10, 1932 (*D. & S. L. W. Construction, and D. & S. L. Control*, 187 I. C. C. 395). On the same date the Commission, in Finance Docket 9562, approved a loan by Reconstruction Finance Corporation to the Rio Grande in the sum of $3,850,000 for the purpose of acquiring control of the Salt Lake Western ($50,000), and constructing the Dotsero Cut-off (187 I. C. C. 399), and the Reconstruction Corporation thereupon approved and authorized the loan. The Commission's order requires the Rio Grande, among other things, to pledge all of the Denver and Salt Lake *Western* stock as security for the loan (187 I. C. C. on 408).

Under date of September 15, 1932, the Commission amended its previous orders in both dockets, relative to commencement of construction of the Cut-off and extended the time until November 15, 1932 (order unreported).

As to the purchase of stock, the Commission's amended order has been complied with by the Rio Grande's deposit with the escrow holder of the number of shares equaling the minority stock, 20,530 shares, and as to the Cut-off, the Rio Grande has acquired control of the Salt Lake *Western* Company, through which it is now engaged in constructing the Cut-off with the proceeds of the loan from Reconstruction Finance Corporation.

Further, under date of November 26, 1932, the Commission authorized the Rio Grande, under paragraph (18) of Section 1 of the Interstate Commerce Act to operate, under trackage rights, over the Salt Lake's railway between Utah Junction (Denver) and Orestod, and over the

Dotsero Cut-off (*D. & R. G. W. Operation,* 189 I. C. C. 129), thereby confirming, and obligating the Rio Grande to, the trackage agreements (*supra,* p. 25); and under date of December 2, 1932, by report and order as yet unprinted, the Commission, in its Finance Docket 9720, authorized the Salt Lake *Western* to issue its stock in the amount of $3,850,000 to the Rio Grande, for the purpose of securing funds to build the Cut-off, and further authorized the Rio Grande to guarantee dividends on the stock, all as required by the Commission in its report approving the Reconstruction Finance Corporation loan, *supra.*

II.

ARGUMENT.

Points to be Argued.

The bill of complaint alleged that the Commission's order was "entirely unsupported by any evidence and is, therefore, illegal, null and void" (R. 9), and that point was slightly stressed in the district court. It has been abandoned here, was not mentioned in appellant's statement of points relied on (R. 162) and has not been urged in their brief. It is, therefore, conclusively presumed that the order was sustained by the evidence. This court will not review the Commission's determination, weigh the evidence, substitute its judgment for the Commission's or question the soundness or wisdom of its findings and conclusions (*U. S. v. New River Co.,* 265 U. S. 533, 542; *Virginian R. Co. v. U. S.,* 272 U. S. 658, 665-666; *C., R. I. & P. Ry. Co. v. U. S.,* 274 U. S. 29, 33-34; *Georgia Comm. v. U. S.,* 283 U. S. 765, 775). In appellants' brief, reference is made to a dissenting opinion by one Commissioner. Of course that opinion cannot be regarded as the Commission's action, but it is noteworthy that even it did not contend that the Commission's order was not supported by evidence, or that any testimony had been improperly excluded.

The sole questions for this court's decision will be argued under the following headings:

1. PLAINTIFF-APPELLANTS, AS VOLUNTARY, UNINCORPORATED ASSOCIATIONS, HAVE (a) NEITHER CAPACITY TO SUE, NOR (b) A LEGAL INTEREST OR ANY RIGHT THREATENED WITH LEGAL INJURY BY THE ORDER, ENTITLING THEM TO SUE.

2. THE EVIDENCE EXCLUDED BY THE COMMISSION'S EXAMINER WAS EITHER ENTIRELY IMMATERIAL OR MERELY CUMULATIVE AND ARGUMENTATIVE, OR CONFIRMATORY OF UNCONTESTED FACTS RECOGNIZED BY ALL.

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1. Plaintiff-appellants, as voluntary unincorporated associations have (a) neither capacity to sue, nor (b) a legal interest or any right threatened with legal injury by the order, entitling them to sue.

The brief for the United States and the Commission contains a full and conclusive argument upon both of these features. It would be but appropriation of the labor of their counsel and a trespass upon the indulgence of this court to undertake an extensive and independent presentation of these important propositions standing at the threshold of this controversy and which, we believe, must result in affirmance of the decree under review. We rely upon the argument of that brief as our own. But perhaps a few words concerning the anonymous appellants should be stated. Their composition as shown by the record has already been stated (*supra*, pp. 21-22). The Moffat Tunnel League is "a sort of a commercial club of counties, * * * commercial clubs, which include service clubs, nominate members of the League and the County Commissioners of the three counties each designate from such nominees the members of the Tunnel League. *Nine members, three from each county, constitute the League*" (R. 89).

So it seems that this "League" has but nine members, selected by County Commissioners out of a larger list submitted by "so-called Service Clubs, the Lions, Kiwanis and Rotary, and so forth" (we quote from the argument of plaintiff's counsel in the court below). Those organizations are no doubt highly laudable and agreeable societies, but neither they nor the boards of County Commissioners are vested by law with any authority to supervise railroad transportation or to create any such "Leagues." The name of any one of the nine members does not appear in the record. There is no evidence that any one of them is a shipper or rides on the Salt Lake, or is a property owner or a taxpayer in the county where he resides or in the Moffat Tunnel Improvement District. Presumably he is just a resident having no more interest in the questions at issue than any other member of the public, and certainly not endowed by any legal interest through his membership in a "League" created in such an informal, extralegal manner as appears here. In the opinion of the District Court (R. 127) and brief for the government and the Commission, authorities are cited to the effect that an unincorporated association has no legal entity entitling it to sue. It is true that in *United Mine Workers v. Coronado Co.*, 259 U. S. 344, while the general rule was recognized that unincorporated associations had no capacity to sue or be sued except in the names of their members (p. 385), it was held that by reason of the national character of the organization there involved, its great and powerful membership and its recognition by legislation both national and state, it was an exception to the rule (pp. 383-388). No such exception is applicable to this "League" of nine men, which attempts to run counter to the position taken by the Moffat Tunnel Commission (the governing body of the Moffat Tunnel Improvement District), two of whose five members come from the counties where the League is supposed to have its habitat (Colo. S. L. 1922, p. 92; S. L. 1927, p. 491; S. L. 1931, p. 455),

and the Public Utilities Commission of Colorado, which has charge of and control over railroad service and transportation. In other words, this League of nine unnamed persons, having no special interest, claiming to represent counties whose real estate is subject to perhaps 5% of the total assessments leviable in the tunnel district, the principal one (Moffat) representing only 1½% of such assessments (R. 80), has sought to become the *dominus litis* in this proceeding, against all statutory bodies and other well recognized organizations such as the Denver Chamber of Commerce.

The Uintah Basin Railroad League is in a similar category (*supra*, p. 22), although its witness took in a little larger territory. It also is composed, he says, of service clubs (Lions, Rotarians, and Kiwanians), besides unnamed towns, "irrigation companies" and boards of county commissioners, not one of whom is shown to be a shipper or to have any special, legal interest or authority in these matters. This "League" being outside of the Tunnel District was deprived of the argument concerning special assessments. It was organized *within sixty days prior to the hearing*, but like its Colorado prototype it seeks to dominate the proceeding in behalf of a mythical railroad, notwithstanding the Public Utilities Commission of Utah stated that it was unopposed to the application "if provision be made and an understanding had that the granting of it shall not in any manner preclude or be prejudicial to any applicant who desires to furnish transportation facilities to the Basin" (R. 117).

Certainly such conglomerate associations of unknown and nebulous membership have no capacity to sue, but if they had they have no such legal rights to protect or legal injuries to redress as entitle them to maintain this suit (*Edward Hines Trustees v. U. S.*, 263 U. S. 143, 148; *Sprunt v. U. S.*, 281 U. S. 249, 254; *Pittsburgh & W. Va. R. v. U. S.*, 281 U. S. 479, 486). If, as held in those cases,

a party whose business will be adversely affected by the Commission's order, or a minority stockholder of an affected carrier, has no such standing, it is impossible to conceive that these appellants have a justiciable right. In the *Pittsburgh & West Virginia case* the court said, referring to the plaintiff minority stockholder (p. 487):

> "This financial interest does not differ from that of every investor in Wheeling securities or from investor's interest in any business transaction or lawsuit of his corporation."

Whatever interest either of these leagues or their members has does not differ from that of every other resident in either of the districts or sections of the two states, and both the *Sprunt* and *Pittsburgh and West Virginia cases* definitely settle that the mere fact that these leagues were permitted to intervene before the Commission does not entitle them to institute this independent suit to vacate the Commission's order (281 U. S. on 255 and 486).

It is obvious that this case has no likeness to those wherein it has been held that railroad or ferry companies whose operations would be directly injured or jeopardized by the Commission's orders may sue to protect their legal rights (*Chicago Junction Case*, 264 U. S. 258; *Western Pacific v. Southern Pacific*, 284 U. S. 47; *Claiborne-Annapolis Ferry Co. v. U. S.*, 285 U. S. 382); or to *I. C. C. v. Diffenbaugh*, 222 U. S. 42, a suit brought not merely by boards of trade having a vital interest in the grain traffic of their communities but by the owners of grain elevators some of whom had contracts with carriers, to enjoin an order of the Commission prohibiting payments by carriers to elevators for service respecting grain in transit. It is to be noted that this court gave little consideration to the question of plaintiffs' standing inasmuch as the Commission did not press the point (222 U. S. on 49), and while that case is not comparable to this, it may well be doubted

whether in view of the *Hines* and *Sprunt cases, supra,* this court would now reach the conclusion acquiesced in in that case. And finally, while there may be language in some of these cases on which appellants rely giving them an excuse for arguing the point, such language must be read in the light of the radically different facts therein presented and the court's subsequent decisions, and restricted accordingly.

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2. The evidence excluded by the Commission's examiner was either entirely immaterial or merely cumulative and argumentative or confirmatory of uncontested facts recognized by all.

(a) *Generally as to the Commission's procedure.*

Proper consideration of appellants' complaints with respect of rejection of alleged evidence cannot be given without regard to the cases that had preceded the hearing at which it was offered.

In 1928 the Commission conducted an extensive hearing on the application of the Salt Lake *Western* to build the Cut-off. The Rio Grande and many other Colorado and Utah interests intervened (R. 143) and were heard. Neither of the present appellants appeared though it seems that the Moffat Tunnel League was then in "existence" (R. 89), and as it took the Uintah Basin League only sixty days to create itself and appear full-panoplied in the present case, it is evident that it could readily have sprung into being for that hearing. In April, 1929, the Commission promulgated its report indicating that the application would be granted providing the Rio Grande was granted trackage rights over the cut-off and the Salt Lake in order to shorten and protect its route (*supra*, pp. 17-18). That report was formally introduced at the hearing (R. 143), and thoroughly deals with the public necessity not only for the cut-off but for the Rio Grande's user.

Appellants claim that they did not intervene in that case because they had no objection to construction and operation by the Salt Lake, a matter we have hereinbefore discussed (*supra*, pp. 22-23). But even after the Commission indicated that Cut-off operations should be by the Rio Grande, appellants raised no protest though they might still have intervened. So that case had been fully heard and a conclusion reached when this control case came on.

In 1925, the Commission conducted a full hearing for several days upon the Bamberger application to build from Provo to Craig. Many parties intervened including numerous commercial clubs and corporations in the Uintah Basin and at Craig, and Moffat County itself. In July, 1926, the Commission's examiner filed a proposed report adverse to the application, to which the Bamberger excepted and then lapsed into a state of atrophy from which it never emerged. The facts respecting this application have also been fully presented (*supra*, pp. 9-10). Of course the Commission learned in that proceeding (if it had never known before—which is inconceivable) of the existence of the Uintah Basin, its lack of railroad facilities and its traffic possibilities which were painted in vivid colors by the hand of a master in the art—Mr. Bamberger himself. So that case had also been heard.

Consequently when the hearing in the present case was opened in March, 1930, the Commission had heard and rendered its report in the Dotsero Cut-off case, had heard and its examiner had long since rendered his proposed report in the Bamberger-Uintah Basin case.

The present hearing was conducted by Haskell C. Davis, one of the most experienced examiners of the Commission's finance division. His long experience in that capacity had doubtless made him thoroughly familiar with the great labor thrown upon the Commission—the hardest worked administrative body in the world—by injection into its voluminous records of masses of irrele-

vant, immaterial, cumulative and argumentative matter as well as facts of such general notoriety as to entitle them to judicial notice. So well known has this been that it has become a trite saying that in these Commission hearings "the lawyers testify and the witnesses argue the case." The examiner doubtless scented similar trouble in the case he was about to hear, and he stated at the outset (R. 62):

> "I have got nothing here about extending the Denver & Salt Lake westerly, Mr. Vogl, not hearing any case of that kind at all, or anything concerning Uintah Basin needs for railroad facilities. * * * We have a specific case here, and I will limit the evidence to what covers this specific case. * * * Now, I am hearing the application of the D. & R. G. to acquire stock control of the Denver & Salt Lake; I am not hearing the Dotsero Cut-off case or Uintah Basin case, or anything of that kind, I am confining the issues to what is before us.
>
> Now, in taking testimony, testimony in its general nature which is merely cumulative will not be taken. Now, that rule will be strictly enforced, and you will govern yourselves accordingly."

The examiner adhered to that statement throughout, and he was clearly right. If after the Commission hears and determines an application involving public interests on an extended record, it must in a subsequent collateral proceeding throw the bars down and open the whole field for testimony and argument, shutting its eyes to what has previously transpired, then its burdens will become intolerable. Ossa will be piled on Pelion in utter confusion. Of course, that cannot be true. A somewhat similar situation appeared in *Georgia Commission v. U. S.*, 283 U. S. 765. There the Commission had prescribed certain reasonable interstate rates on Georgia products, but first declined to harmonize intrastate rates with them, saying that

the *Georgia Commission* would doubtless cooperate to that end. It declined to do so, whereupon the Commission granted a rehearing upon the carriers' application, to determine whether the *intrastate* rates resulted in undue prejudice to *interstate* shippers. At that rehearing, the Georgia Commission demanded that the Commission again receive evidence as to the reasonableness of the interstate rates it had previously prescribed. The Commission rejected this evidence saying (160 I. C. C. on 313, quoted in footnote to 283 U. S. 770):

> "If the contention made * * * in this regard were sound, then our efforts to secure cooperative action in situations such as here presented, instead of bringing about that result, *could be made the instrument of burdening this commission with endless investigations covering the same subject matter and would result in litigation being prolonged indefinitely.*" (Italics ours.)

The Georgia Commission attacked the Commission's action and sought to set aside its order because it was not the result of a "full hearing." This court sustained the order, saying that while such an order required a determination of reasonable interstate rates, that having been done in the original proceeding and no change in conditions being shown, no reconsideration of that issue was required.

In their brief, appellants attempt to prove the examiner guilty of irregular conduct because of this statement of the district court in the case at bar (R. 129):

> "Realizing that much of this controversy had already been decided by the Commission in the previous cut-off proceedings, the Examiner was firm in holding the examination to the single ultimate question of public interest involved in the proposed stock purchase and control of one railroad by the other."

That is the quotation appellants rely on, but it may be well to place in juxtaposition to it, the district court's statement immediately following, correctly explaining the remarkable purpose of the appellants (R. 129):

> "The intervenor-plaintiffs however wished to open up the controversy from the beginning and introduce evidence on nearly every phase, including the views of witnesses who had, when the controversy was raging, in the public press and on the public platform, expressed themselves in a particular way."

Appellants claim that the first quoted statement "convicts the Examiner of proceeding directly contrary to the decisions of this Court," and *B. & O. R. Co. v. U. S.*, 264 U. S. 258, *U. S. v. Abilene & S. R. Co.*, 265 U. S. 274 and *I. C. C. v. Louisville & N. R. Co.*, 227 U. S. 88, are cited in support of the claim that the Commission had no right to consider what it had decided in the previous cases. Those authorities go no further than to hold that *evidence* must be introduced before it may be considered, but they certainly do not sustain the proposition that the Commission must be oblivious to its previous reports and orders. And in the present case its report and order in the Dotsero Cut-off case was actually placed in evidence (R. 63, 143). See, *U. S. v. B. & O. S. W. Ry.*, 226 U. S. 14, 20.

Our views on these questions are admirably expressed by the three-judge District Court for the Western District of Pennsylvania, in *Pennsylvania R. R. Co. v. U. S.*, 40 Fed. (2) 921, a suit to set aside an order of the Commission. Therein, referring to a prior decision of the Commission in a related matter, the court used this language especially applicable here (p. 924):

> "The Commission was not required to shut its eyes to what it saw in that proceeding or close its mind to the knowledge it there acquired, and proceed afresh in the instant application for a short

extension from the long one without regard to what it knew—and could not forget—had a bearing one upon the other. Whatever regard the Commission may have given the former application *as a related matter, distinguished from an evidential matter, in determining the later application cannot invalidate its last order.* United States v. Abilene & S. R. Co., 265 U. S. 274." (Italics ours.)

And earlier in that opinion the court said (p. 923):

"Nor do we think that, as in the case of a judge trying facts, every phase of every fact pertinent to an application for a certificate of convenience and necessity need formally be proved and formally found because, in reposing discretion in the Commission, the Congress evidently had in mind that it was legislating with respect to a body of experts whose knowledge of transportation had through the years been accumulated from innumerable sources throughout the United States, and that, in carrying out the new policy of the transportation law, it intended that they should act as such, just as it looks upon the United States Board of Tax Appeals as a body of experts on taxation and intends, in given cases, such as special assessment of corporation taxes, that they should act as experts, and from their action in those cases it provided no appeal."

In *I. C. C. v. C., R. I. & P. Co.*, 218 U. S. 88, 110, this court said with respect to an order of the Commission:

"Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, 'due to the judgments of a tribunal appointed by law and *informed by experience.' Illinois Central Railroad Company v. Interstate Commerce Commission,* 206 U. S. 454, and cases cited." (Italics ours.)

But the essence of appellants' argument is that this Commission "informed by experience" must convert its mind into a state of complete vacuity whenever it hears a case, no matter what has gone before. This is *reductio ad absurdum.*

There are other well-established principles to which we refer before proceeding to a discussion of the testimony excluded. They are that the "Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules as to the admissibility of evidence, which prevails in suits between private parties" (*Interstate Com. Comm. v. L. & N. R. Co.,* 227 U. S. 88, 93). And in *U. S. v. Abilene & So. Ry. Co.,* 265 U. S. 274, 288, the court said:

> "The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. *Interstate Commerce Commission v. Baird,* 194 U. S. 25, 44; *Spiller v. Atchison, Topeka & Santa Fe Ry. Co.,* 253 U. S. 117, 131. *Compare Bilokumsky v. Tod,* 263 U. S. 149, 157."

In *Bilokumsky v. Tod,* 263 U. S. 149, the last case cited in the foregoing excerpt, the court said (p. 157):

> "Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received."

In *Spiller v. A., T. & S. F. R. Co.,* 253 U. S. 117, an action to recover reparations awarded by the Commission, the court said (p. 126):

> "If we were called upon to review the proceeding as upon a writ of error or appeal it might

be difficult to say that no improper evidence was admitted, that production of the best available was insisted upon, or that a different conclusion might not have been reached upon that which was admitted. But the scope of the judicial review is not so extensive."

Finally, before proceeding to discuss the specific offers to prove, we submit in the light of the above authorities that the rulings of the examiner are not to be tested by those enforced in judicial proceedings; that this court would not be justified in enjoining the Commission's order even though it might conclude, from the standpoint of a lawsuit, that testimony should have been admitted, providing, of course, that the record contains substantial evidence to sustain the order; and that unless the court should believe that material evidence was excluded, and that it was of such nature that the Commission's report and order would have been different if it had been received, the court will not enjoin the Commission's decision. If every order of the Commission is to be enjoined because of departure from the rules applied in courts of law, it may safely be asserted that few of them would stand. The application of such a principle to the Commission's orders would result in an intolerable flood of litigatio and in practical destruction of the Commission's authority and powers.

Nothing in the preceding discussion must be taken as an admission that the Commission or its examiner erred in the case at bar. We have emphasized that the contentions of present appellants would emasculate the Commission's jurisdiction and subject to attack practically every order it makes.

We now proceed to a discussion of the alleged errors in exclusion of testimony and propose to substantiate the statement of the present heading.

(b) *Offers as to the desirability of extension westerly from Craig.*

It is a fair statement that the great burden of appellants' argument is that the examiner erred in excluding evidence of old plans (now obsolete) to extend the Salt Lake westerly and the need for such an extension. While appellants' brief enumerates thirteen items of excluded offers identical with those specified in the bill of complaint (R. 6-7), they may be broken down into a very few headings, and running through practically all of them is the claimed necessity for this western extension. The following is, we believe, a substantially accurate summary of the offers dealing specifically with this question:

> That the public convenience and necessity requires the construction of an extension westerly from Craig (R. 93) (of course that is not an offer of testimony but a mere conclusion); that from the time the Salt Lake commenced construction it was held out that the purpose was to construct the extension (R. 94); that many hundreds of settlers were induced to go into the Basin by reason of "prospects" held out to them by the Salt Lake's predecessor, government agents and commercial bodies of the "imminent probability" of the extension and that they left because of lack of railroad facilities (R. 112); that the Salt Lake's predecessor conducted a campaign of colonization and held out to the public and possible settlers that its purpose was to extend the line to Provo or Salt Lake City, and that advertisements appeared holding out that inducement (R. 112); and that the government held out similar inducements for colonization by advising of the "probability of the extension" (R. 112).

Substantially all of these offers were presumably to be made good through a witness (Paul) who lives in the

Uintah Basin and had been connected with the *old* Moffat road prior to 1918 (R. 109) and it is perfectly evident that they related to what occurred many years ago, certainly not within the past fifteen years.

Preliminary to a discussion of those offers, we note that the first claimed exclusion was of evidence "that the construction of the Moffat Road has from the beginning included a plan * * * for a western extension" (R. 6). That offer (R. 81) was not made by the appellants but by counsel for other parties who have not appealed. It cannot be invoked by appellants, for "we have said several times that we will not listen to a party who complains of a grievance which is not his" (*I. C. C. v. C. R. I. & P. R. Co.*, 218 U. S. 88, 109). It is important, however, only because it might indicate that this plan existed at the time of the hearing or until shortly before. That offer was made before it was developed by the examination of the Salt Lake's chairman, largely conducted by the same counsel who made the offer, that the Salt Lake has no such plan and has had none in recent years (R. 98-99; *supra*, pp. 7-8).

We make that clear so that the court will understand that the omnibus offers to prove inducements, advertisements and solicitations for colonization deal with a dead past, and not with the present Salt Lake Company.

Now, it required no proof whatever that there was no railroad through the Basin, and that its transportation conditions would be improved by a railroad (even though other forms of transportation constitute increasingly ominous competition). That was conceded in the Rio Grande's brief in the Bamberger case extracts from which were introduced by these appellants (*supra*, pp. 10-11). It was recognized by all. It required no proof that all residents in the Uintah Basin would be delighted to have a

railroad, though they might not patronize it, provided they were not required to contribute capital for its construction. But of what possible materiality in this case would be evidence of old and obsolete plans or abandoned "promises" or "prospects" or assurances of "imminent probability," in the face of the fact that there was no one in sight at the time of the hearing willing to risk a dollar in the hazardous enterprise of building 300 miles of railroad even in the "boom" years of 1925 to 1929 to say nothing of 1930 when the hearing occurred. This was not an application to extend the road, nor was there any party before the Commission objecting to the Rio Grande's application because he was ready to extend. Bamberger was there it is true, but from our summary of his case on page 8, it will certainly appear that his dream had faded, and all he asked was that if *any* railroad was *ever* built by *anyone*, that party should have *trackage rights over the entire Salt Lake*. Even if the Salt Lake were financially able to carry the heavy burden, it could not be forced against its will to make this extension (*I. C. C. v. Oregon-Washington R. & N. Co.*, 53 Sup. Ct. Reptr. 266).

Is the public interest in the immediate building of the Dotsero Cut-off which it was believed would be accelerated by the Rio Grande's control of the Salt Lake, to be frustrated by the mere hope that sometime, somehow, a railroad will be built through this Basin? We think the answer must clearly be in the negative. But even if a scintilla of materiality could be found in the offers, is it conceivable that such testimony would have influenced the Commission's action in the least? It knew all that it was necessary for it to know respecting a possible extension, from the facts in evidence. Its examiner stated more than once that he would receive a statement of conditions which it was felt should be attached to the order (R. 79, 102). For example he said (R. 102):

> "I do not care to take general testimony involving the construction of a new line through the Uintah Basin; but they feel it is necessary to introduce some testimony as a basis for their requests to attach conditions to the order. I think they have a right to do that. I will let them introduce a reasonable amount of testimony for that purpose."

And when the Commission issued its report it devoted two pages to a discussion of this feature (R. 27-28), and because of the expressed desire of many parties, and probably due to the position of appellants themselves, it required the Rio Grande to agree in writing filed with it, that through the Salt Lake, it would "establish such through routes in connection with any western connection hereafter constructed under our authority as we may find in a subsequent proceeding or proceedings to be reasonable and in the public interest" (*supra*, pp. 24-25).

That was certainly all that the Commission could reasonably do for the protection of a hypothetical railroad, or the hopes of the people of the Uintah Basin.

As proof that this offered testimony was merely cumulative or of unnecessary detail, and that the record was ample to enable appellants to make their contentions before the Commission, we feel justified in quoting a very lurid extract from their brief filed with the Commission at the conclusion of the hearing:

> "The evidence, limited though it was by the Examiner's exclusion of testimony, shows that west of Orestod is a great empire of vast and varied resources; that encouraged with the vision and promise of coming railroad transportation, pioneers have gone into this empire to develop it; that they have been willing to back their belief in the country with a pledge of their credit for the construction of the Moffat Tunnel; that by the cooperation of the

railroads and the taxpayers the Moffat Road is now earning substantial net incomes instead of annual deficits; that now the applicant—which in the past has neglected its own territory in Colorado because of its ambitions to be a transcontinental line—sees in the Moffat Road an aggressive and growing competitor and it is therefore seeking to control this competitor."

Of course the able counsel for appellants would not have made that argument unless he believed there was evidence in the record which justified it, and if there is anything in the rejected offers which would have enabled him to paint his picture even more vividly, it would certainly be cumulative.

The District Court very properly said concerning those matters (R. 129):

> "Some of the matters that the intervenor-plaintiffs desired to introduce were not pertinent to the precise issue then involved. Moreover, they had nothing tangible on which to base objections to the stock acquisition. Neither the plaintiffs nor anyone else had a plan to do what all (with the probable exception of the Rio Grande) desired, namely: the extension of the Moffat Road west from Craig to the Uintah Basin. Nor was there any evidence of a likelihood of any plan being made until traffic conditions should inspire one.
>
> The intervenor-plaintiffs suggest that if the Commission's order should, as they urge, be annulled, the first order authorizing the Moffat Road to build the Cut-off would stand. Yet, if that be true, it would stand with its unperformed condition as to trackage rights, and the situation would remain as it has stood through the years with no immediate prospect of building the Cut-off, which

everyone wants, and certainly no prospect even remote of an extension of the Moffat Road from Craig to the west. Such an extension would, without regard to ownership and control, inevitably depend on traffic conditions. So it appears that the exclusion of evidence was not prejudicial to any rights which the plaintiffs claimed but was only disturbing to their hope that somehow, sometime, in some way the Moffat Road would be projected from Craig westwardly. Yet under the Commission's order the realization of that hope is preserved for it expressly leaves open the way westward and makes it just as possible to extend the road with the order in force as to extend it with the order annulled."

(c) *Offers as to the resources of the Uintah Basin in Utah.*

This is closely associated with the last topic. Appellants offered to prove by *twelve* Utah witnesses

> "the available resources of the Uintah Basin, for the purpose of showing the public interest in having a construction of the present Denver and Salt Lake Road, either by the Denver and Salt Lake road or by some other company, west from Craig to either Provo or to Salt Lake City" (R. 111).

All that we have said answers the claim of error in excluding this testimony, but the mere statement of the offer shows into what a wide and useless field the case would have entered if the testimony had been allowed. If appellants had been permitted to prove by *twelve* witnesses the resources of the Basin, the Rio Grande could have assembled twelve others to combat that testimony, and, so encouraged, various interveners might have entered this arena so rich in controversial possibilities. Such testimony would have been vital if this were an ap-

plication to extend the railroad, but it would have been perfectly futile on the actual issues.

(d) *Offers as to the "extension" with respect to the Moffat Tunnel.*

Interlarded with the offers of proof regarding the desired "extension" was the Moffat Tunnel.

Much of this testimony was offered by other parties and not by appellants, for instance that found at pages 81 and 100 of the record and stated by appellants as items (2) and (3) (R. 7), and which is that in assessment of benefits in the Moffat Tunnel Improvement District there had been included the benefits to lands in the district resulting from operations over the Dotsero Cut-off, the Denver-Craig line and the "extension" (R. 81); and that the construction of the tunnel and the organization of the tunnel district were based on a "long series of public activities and public campaigns" by organizations in Colorado, as a means to facilitate successful operation of the Salt Lake, not only as a local road leading to the northwestern part of the state, but as a through connection for the general benefit of the state and of the various districts of the state, which it was expected would be made with Utah common points (R. 100).

We believe that appellants cannot avail themselves of these offers made by others (*I. C. C. v. C., R. I. & P. R. Co.*, 218 U. S. 88, 109). As said by the District Court (R. 129):

> "An analysis of the hearing indicates that some of the matters excluded were not offered in evidence by plaintiffs' counsel, but by counsel representing other intervenors of which we think the plaintiffs cannot avail themselves in this suit. These were matters for the others to complain about. This they have not done."

However, appellants did make offers of their own substantially as follows (R. 92):

> That the matter of the construction of the Moffat Tunnel has been of public importance to Colorado since about 1912; that during that time several projects were put forward and votes taken, both in the legislature and by referendum votes of the people, and that in each instance the people in the territory now included in the district voted for construction of the tunnel, and that the people along the territory which would be benefited by the Rio Grande's acquisition of the Salt Lake have consistently voted against it.

Regardless of the question as to appellants' right to complain of exclusion of offers on this subject, there was no error in such exclusion. The record fully shows the formation of the Moffat Tunnel Improvement District, the construction of the tunnel, the amount of outstanding bonds, the basis of assessments on real estate in the district, the lease of the tunnel to the Salt Lake and the rentals payable by it (R. 77-80, *supra,* pp. 4-6). Therefore the Commission was apprised of all relevant facts regarding the district, its boundaries, and the extent to which all real estate might be subjected to assessments to meet interest or principal of the bonds over its other revenues from the tunnel, which would include not only railroad rentals but those derived from other uses, for instance, water transportation (R. 80).

Of what possible value would be the motives which actuated legislators or people in voting upon any tunnel proposition either the one finally accomplished or any predecessor? Should evidence have been received from voters as to how they voted or what induced the votes they cast? How could one voter testify concerning the motives of another? And in this connection it may be observed that

the Moffat Tunnel Act was enacted by the legislature and not upon vote of the people, so that if the door had been opened, members of that body might have been called to testify as to what influenced their legislative votes. The record already clearly showed that one purpose of the tunnel construction was the possibility that it might be an aid to the western extension. The Commission itself had recognized this in the Dotsero Cut-off case as stated in its full report therein which was introduced in evidence (R. 144). But we again desire to emphasize, what we have already stated, that the two purposes of the tunnel construction to which this court referred in its opinion upholding the Moffat Tunnel Act, were the preservation of the Salt Lake road as actually constructed and the encouragement of the cut-off (*Milheim v. Moffat Tunnel District*, 262 U. S. 710, 718-720).

All the reasons we have previously stated against the materiality or relevancy of the testimony offered concerning the western extension are applicable to this associated matter and we contend, as we did with respect thereof, that all essential facts concerning the tunnel and the district had been fully presented, were recognized by all including the Commission, and that the offers contemplated injection of testimony not merely irrelevant but cumulative, and calculated to divert the hearing from the essential question involved.

(e) *Offers as to competition between the Rio Grande and Salt Lake, including coal.*

Paragraph (8) of Section 5 of the Interstate Commerce Act (U. S. C., Title 49, Sec. 5 (8)) expressly provides that any carrier affected by an order made under paragraph (2) of that section is relieved from the operation of the "antitrust" laws. The examiner permitted all of the testimony which was offered to show that there was competition between the Rio Grande and the Salt Lake.

For example, appellants' witness Johnson testified that there was competition "in a way" on horses, hogs, cattle, sheep, wool, gilsonite, oil and *coal* (R. 90), and that there was keen competition between the two railroads on livestock shipments (R. 89, 90, 96); and their witness Paul testified to competition on livestock, wool and gilsonite from Utah points (R. 110, 115). Of course this testimony did not stand uncontradicted. It was vigorously disputed by the Rio Grande. The disinterested witness Pexton of the Denver Union Stockyards, testified that whatever competition there was between the two railroads on livestock "would be limited to a very narrow zone" (R. 87), and similar testimony, contradicting appellants', was given by witness Taylor (R. 117-118). The Rio Grande's principal witness Williams, under cross examination by appellants' attorney said (R. 71):

> "The shippers on the Moffat Road and applicant's (Rio Grande's) road compete, but 'the roads do not compete, as I understand it'."

It thus appears that all of the evidence on competitive questions was permitted by the examiner.

But appellants contend that evidence concerning competitive coal fields on the Rio Grande and the Salt Lake was improperly excluded and they seek to annul the Commission's order on this account. The testimony on that subject appears at record page 90, where, after appellants' witness Johnson testified to competition on various commodities, including *coal*, he stated that he understood there was a large movement also of coal from points in Colorado on the Rio Grande. He further testified that the coals in the Routt County fields of the Salt Lake were of about the same quality as the coals on the Rio Grande. Those answers were given, Rio Grande's counsel objected and the objection was sustained, but the answers were not stricken and no further testimony with respect to competition between shippers of coal on the two railroads was

either presented or offered (R. 90), and, if it had been, it would have been purely cumulative. The Commission therefore had before it proof that there were competitive coals on these two railroads and, as an experienced body, this fact was self-evident. Appellants contend that in *Control of Virginian Railway,* 117 I. C. C. 67, the Commission considered the fact that there was competition between coals. In that case many coal operators appeared and vigorously protested. Without conceding that competition between shippers on two railroads is material, as distinct from competition between the railroads themselves, we assert that in this case all the evidence which was presented respecting competing coals, was in the record for the Commission's consideration. None of it was stricken and no offer was made by appellants to present further testimony on that subject. Furthermore, not a single coal operator on the Salt Lake intervened in the case to protest the acquisition of control, and it is impossible to conceive how these appellants could vicariously represent the coal interests, or that the witness Johnson (a milling and elevator operator) could give any testimony of value on this subject.

In its report the Commission dealt at length with this question of competition, mentioning coal, but held that the character and extent thereof was not such as to prohibit the granting of the application (R. 29-31).

The opposing brief states that it will be "easily seen" that the Rio Grande could give preference to coal on its line, as against the Salt Lake. If that be true, the fact being self-evident, no evidence was required, but it is difficult to see how the Rio Grande would be inclined to give such preference if it owned every share of Salt Lake stock, as may well happen under the Commission's order.

On this state of the record, without any offer of proof in addition to what was in the record, concerning competi-

tion between coal shippers on the two railroads, and without the appearance of any party interested in the traffic, there is no room for contention that the Commission's order should be set aside. Certainly all questions respecting competition were adequately presented by the record, and known to the Commission. If appellants had any desire to present further proofs on this subject it was their duty to make offers as they had done in other matters.

(f) *Offers as to possibility of diversion of traffic from the Salt Lake to the Rio Grande.*

This is item (11) of appellants' alleged errors in exclusion of testimony (R. 8). The only offer on this subject was to prove that "a large volume of construction material which necessarily will move into the territory adjacent to the Moffat Road and adjacent to the Rio Grande Western road, for purposes of construction of catch basins and similar devices in connection with the proposed construction of the Boulder Dam" and that if the Rio Grande was permitted to control the Salt Lake it would be in a position to divert this business to itself (R. 91-92).

We submit that this offer trifled with the situation. It apparently referred to some temporary shipments which might, at the option of the shipper, pass over the Rio Grande or the Salt Lake, and that the Rio Grande could, through its control of the Salt Lake, divert these shipments to itself. It is almost unnecessary to refer to the provision of the Interstate Commerce Act which vests in the shipper the control of the route which his shipment shall take (U. S. C., Title 49, Sec. 15 (8)). It is perfectly obvious that this testimony entered into the realm of surmise as to how these transitory shipments would move and it requires no further argument to establish that such testimony would not only have been immaterial and conjectural but would have had no influence upon the Commission and even if material should not result in the overturning of its order. It is ridiculous to contend, as ap-

pellants have done, that any diversion of these temporary shipments would "financially wreck" the Salt Lake.

In connection with this subject appellants assert that the Rio Grande's control would enable it to reduce the Salt Lake's line west of Orestod to the status of a branch or spur and thereby to impair the service thereon. That was a matter for argument to the Commission, there was no evidence supporting it. Both the Interstate Commerce Act and the Colorado Public Utilities Act vest in the respective commissions full authority to prevent such action if it were attempted.

(g) *Offers as to hostility of the Rio Grande to a western extension.*

This is item (13) of appellants' specification of alleged errors in exclusion of testimony (R. 8, 100). A reference to page 100 will show that the offer was not made by appellants but was made by other parties and was in substance an offer to prove that the enterprise known as the Rio Grande, *prior to its 1924 reorganization,* had manifested hostility to "construction of the facilities of the Denver and Salt Lake *Western* Railroad (sic) which would lead to an extension west."

Not only was this testimony offered by parties other than appellants, but it was made during the course of the examination of the chairman of the Salt Lake's board, who indicated that there had been no such hostility manifested by the Rio Grande in recent years (R. 98-99), and the offer resulted from the examiner's refusal to allow the witness to answer a question as to the Rio Grande's attitude *prior* to its 1924 reorganization. The examiner said (R. 99):

> "What difference does it make what the attitude was prior to 1924. This is 1930. I do not care to go way back in history six or eight or ten years; that does not help us any."

It is merely necessary for us to say that in the face of the evidence, which had just been given, that the Rio Grande had not manifested such opposition to the Salt Lake's extension since its 1924 reorganization, the evidence of what its prior attitude had been was entirely immaterial and certainly cannot be invoked by these appellants who did not participate in the offer.

The position of the Rio Grande with respect to a railroad through the Uintah Basin was fully shown by the record and has been presented herein (*supra*, pp. 7-13). Nothing could be gained by a repetition of what is there said.

III.

CONCLUSION.

Much of the argument in appellants' brief is devoted to quotations from the Commission's reports in other cases, and to *dissenting* opinions in the present case; to attempts at discrediting the Commission's final consolidation plan (*Consolidation of Railroads*, 159 I. C. C. 522) by references to Professor Ripley's prior report and the Commission's *tentative* report; to assertions that the Commission's condition requiring the Rio Grande, through the Salt Lake, to establish through routes with any future connection at Craig as the Commission may hereafter find to be reasonable and in the public interest, should have been stronger and in line with the condition it imposed in another case where the situation was different (*Clinchfield R. Lease*, 90 I. C. C. 113); and to quotations from the Commission's report in *D. & R. G. Investigation*, 113 I. C. C. 75, dealing with events from 1905 to 1915, and not with the present Rio Grande.

In other words the wisdom of the Commission's action and its judgment and conclusions were thereby impliedly attacked. As already stated this court has frequently said that it will not review such questions (*supra*, p. 28), and

they are improperly injected into this case and require no answer.

The Commission found that the control sought was in harmony with its consolidation plan and would advance the same (R. 33); that it would facilitate the prompt construction of the Dotsero Cut-off so urgently desired by all parties other than appellants (R. 33); and that it was in the public interest (R. 33). All parties, save appellants, approved and acquiesced in this decision, including the Public Utilities Commission of Colorado, the Moffat Tunnel Improvement District and its Commission, the Denver Chamber of Commerce, the Public Utilities Commission of Utah and others; and the State of Colorado ex rel. its Public Utilities Commission, and the Moffat Tunnel Improvement District intervened in this case to support the order.

Under the authorization and indeed the compulsion of the order and those supplementing it, and the condition imposed in the Dotsero Cut-off case, the Rio Grande has undertaken and is now engaged in the performance of obligations to the public especially onerous in these disjointed times (*supra,* pp. 25-28), and it is respectfully submitted that the hearing complied with the statute, cannot be attacked by these unidentified appellants having no legal identity, and that no errors were committed by the Commission.

The decree of the District Court should be affirmed.

HENRY MCALLISTER,
Solicitor for The Denver and Rio Grande Western Railroad Company, Defendant-Appellee.

ELMER L. BROCK,
Solicitor for The Denver and Salt Lake Railway Company, Intervener-Appellee.

ERSKINE R. MYER,
Solicitor for The Moffat Tunnel Improvement District and Moffat Tunnel Commission, Intervener-Appellees.